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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. [redacted] 9

THOMAS C. ROWLEY, TREASURER OF CONVERSE COUNTY, STATE OF WYOMING; CHARLES M. HALL, TREASURER OF FREMONT COUNTY, STATE OF WYOMING; ALTA PEARL MASSEE, TREASURER OF NATRONA COUNTY, STATE OF WYOMING; AND D. A. SHOOPMAN, TREASURER OF NIOBRARA COUNTY, STATE OF WYOMING,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL H. CADY,
WILLIAM T. FARICY,
Of Chicago, Ill.
ROBERT R. ROSE,
Of Casper, Wyoming,
Counsel for Respondent.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

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OCTOBER TERM, A. D. 1933.

No. 892

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CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURT BELOW.

C. & N. W. Ry. Co. v. *Rowley,* 1 Fed. Sup. 729.

Rowley v. *C. & N. W. Ry. Co.,* 68 Fed. (2d) 527.

STATEMENT OF THE CASE.

This is a suit in equity brought by the Chicago and North Western Railway Company against the County Treasurers of four Wyoming counties to restrain the collection of taxes claimed to be excessive and illegal. The Bill, filed in the District Court November 7, 1931, alleges (R. 1-8) that the State Board of Equalization, which is charged under the Wyoming Statute with the duty of assessing railroad property at its actual value each year prior to and including the year 1931 valued complainant's property for tax purposes at an amount more than $2,000,000.00 in excess of its actual value; that in the year 1931 the value fixed by the Board was $7,881,003.94, which was $2,031,433.94 in excess of the actual value that year; that the plaintiff owned and operated 8,180.2 miles of main line track in nine states, including 278.35 miles in Wyoming, and that the value of the Wyoming property per mile was less, and known by the State Board to be less, than one-half of the average system mile; that the State Board of Equalization determined the system value to be $375,285,902.00, and in allocating to Wyoming the value of the property in that state used as one of the factors 3.29%, representing the percentage in Wyoming of the system main line track, and that this factor was used arbitrarily and unlawfully without taking into account the difference in value between the Wyoming track mile and the system track mile; that the use of the main line track mile factor constituted a wholly wrong principle and method of fixing the value of the Wyoming property and resulted in an over-valuation of the complainant's Wyoming property amounting to more than $2,000,000.00.

It is also alleged in the Bill that the taxes levied by the

County Assessors of the four counties, upon values apportioned to the counties by the State Board upon the over-valuation mentioned, were illegal and excessive in proportion to the over-valuation and constituted a lien upon complainant's property and that unless the defendants were restrained from so doing they would sell complainant's property for the taxes.

The Bill of Complaint also alleged a systematic under-valuation of property other than that of the complainant and the omission from the tax rolls of a large amount of taxable property. The trial court found, however, that the allegations as to under-valuation and omission of taxable property were not sustained by sufficient evidence, to which no exception was taken by complainant, so that that element is eliminated from the case.

These allegations, in addition to the allegation as to diversity of citizenship, the amount involved as to each defendant and the allegation that the discrimination by the Board constituted an invasion of complainant's rights under the Fourteenth Amendment to the Federal Constitution and a violation of the commerce clause thereof constitute the substantive allegations of the Bill.

A temporary restraining order was issued upon the filing of the Bill (R. 8-10) and a temporary injunction was issued on December 28, 1931 (R. 11-12), previous to which time complainant had paid the taxes admitted by it to be due in accordance with the temporary restraining order.

Defendants' answer, filed January 7, 1932 (R. 12-27), admitted the diversity of citizenship; the jurisdictional amount; that the taxes levied would be collected by sale unless such action should be restrained; that the taxes levied constituted a lien upon complainant's property; the value fixed upon complainant's property by the State Board; the system and Wyoming track mileage as alleged

in the Bill; the system value as alleged; the consideration by the State Board of the percentage of Wyoming main line track in arriving at the value of the Wyoming property; and denies that complainant's property in Wyoming was over-valued and denies that the method by which the valuation was arrived at was arbitrary or unlawful.

The answer also denies the under-valuation or omission from the tax rolls of property other than that of the complainant and alleges that complainant's Wyoming property was actually worth several thousand dollars more than the value fixed upon it by the State Board.

The answer denies the allegation of the Bill that complainant has no adequate remedy at law and alleges that it has such remedy.

The substantial questions presented by the pleadings are:

1. Has the Federal Court jurisdiction in equity to grant the relief prayed for?

2. Did the use by the State Board of Equalization of the figure 3.29, representing the percentage of complainant's main line track in Wyoming, constitute a wholly wrong principle and method, resulting in an arbitrary and illegal over-valuation of complainant's Wyoming property?

After trial of the cause in March, 1932, and a written memorandum of the trial judge (R. 28-33) denying jurisdiction, a second memorandum was filed November 9, 1932 (R. 33-44) and findings of fact and conclusions of law filed December 17, 1932 (R. 45-49), in which the trial court found that the State Board used the percentage of miles of road in arriving at the value of complainant's Wyoming property without taking into account the difference between the cost and value of the average amount of road in the State of Wyoming as compared with the average system

mile, and that such use was erroneous, improper, unequal and arbitrary and constituted an arbitrary and unreasonable method and the application of a wholly wrong method and principle of determining the value of complainant's Wyoming property, resulting in an over-valuation to the extent of $1,602,468.90. And the court also found that complainant had no adequate remedy at law and that the trial court had jurisdiction in equity to grant the relief prayed for in complainant's Bill of Complaint, and a decree was entered accordingly (R. 48-49).

Upon appeal by defendants to the Circuit Court of Appeals, Tenth Circuit, the decision of the trial court was affirmed in an opinion by Circuit Judge Bratton, on January 9, 1934 (R. 151-156), with District Judge Symes dissenting (R. 156-162).

ARGUMENT.

I.

THE UNITED STATES DISTRICT COURT HAD JURISDICTION IN EQUITY.

There are admittedly present in this case diversity of citizenship and the requisite amount in controversy (R. 12-27). The bill is filed to restrain the collection of such an intentional and persistent over-assessment as would contravene the Commerce Clause of the Federal Constitution and the Fourteenth Amendment (R. 1-8).

(a) *Prevention of Multiplicity of Suits.*

As to the prevention of a multiplicity of suits and the inadequacy of alleged remedies at law, this case is ruled by *Wilson, Collector* v. *Illinois Southern Railway Company*, 263 U. S. 574. Like that case, this involves an over-assessment, made by a state board, and apportioned among all the counties in which the respondent's line of railroad extends. There is present here exactly the same necessity of pursuing in each of the four counties among which the assessment is apportioned, a separate suit at law, that there was in each of the five counties involved in the *Wilson case*. There is the same danger of a different result in each of the four counties. Such a remedy is not adequate. Manifestly, a multiplicity of suits is avoided by the present equity action.

The remedy provided by Wyoming Revised Statutes, sections 89-4201 to 89-4203 (quoted in Petitioners' brief, pages 13-14 and reproduced in the appendix hereto) authorizing the payment of taxes claimed to be illegal and the

maintaining of an action to recover such taxes, clearly contemplates a separate action in each county. As the court said in the decision sought to be reviewed herein, "obviously, four separate actions would be required, one against the Treasurer of each county" (R. 153).

Other cases sustaining the equity jurisdiction of the Federal courts under similar circumstances are:

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20 at 38-40.

Greene v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499.

Union Pacific R. R. Co. v. *Board of County Commissioners of Weld Co.*, 247 U. S. 282.

The remedy provided by Wyoming Revised Statutes, section 115-311 (quoted in Petitioners' brief, page 13 and reproduced in the appendix hereto), requiring the Board of County Commissioners to direct the County Treasurer to refund to the taxpayer taxes found to be erroneous or illegal, is not adequate, as it necessarily implies the bringing of an action in each of the four counties in case the Board of each county refuses to recognize the claimed illegality of the tax. The same multiplicity of suits described above would be present here.

(b) *State Statutory Remedy Only a Restricted One.*

The remedy of suit for refund under the Wyoming Statutes is a restricted one, since under the decision of the Wyoming Supreme Court in *Carton* v. *Commissioners,* 10 Wyo. 416, 438; 69 Pac. 1013, illegal taxes paid cannot be recovered under these statutes unless they were paid under duress of a warrant in the hands of a tax collector. Such a remedy is not the prompt, certain, complete and efficient remedy which must be available to defeat federal equity

jurisdiction. *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288.

(c) *State Statutory Remedy Makes no Provision for Interest.*

The statutes quoted do not provide for the recovery of interest. Such a remedy is not adequate. *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393.

(d) *Preventing Cloud on Title.*

Another ground of equity injunctive relief present here is that the alleged illegal tax creates a cloud upon the title to respondent's property. It is alleged in the Bill (R. 7) and admitted in the Answer (R. 23) that the taxes levied constitute a lien upon respondent's property and, if not paid, a cloud upon respondent's title thereto. Decisions of this court establish equity jurisdiction in such cases. *Union Pacific Railway Company* v. *Ryan, Marshal of the City of Cheyenne,* and *City of Cheyenne,* 113 U. S. 516, was an action to restrain the collection of taxes illegally imposed. The equitable ground relied upon was that the lien of the illegal tax created a cloud on the railway company's title. The city urged the existence of an adequate remedy at law. Speaking of the taxpayer's remedy, this court said:

> "Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief."

In *Ohio Tax Cases* (*Ohio River and Western Railway Co.* v. *Dittey*), 232 U. S. 576, this court discussed cloud on title as a ground for equitable interference and at page 587 said:

> "The right to invoke equity jurisdiction is clear; for the act specifically makes the tax a lien upon the real

estate of appellants, from the cloud of which they sought to free it by the bringing of these actions * *."

Other cases in point on the question of cloud on title are:

Shaffer v. *Carter,* 252 U. S. 37.
Wallace v. *Hines,* 253 U. S. 66.
Ogden City v. *Armstrong,* 168 U. S. 224, 237.
Risty v. *C. R. I. & P. Ry. Co.,* 270 U. S. 378.

(e) *Law Remedy to Defeat Federal Equity Jurisdiction Must be Available in Federal Court.*

It should be remembered that once the justiciable stage of a controversy has been reached, the adequate remedy at law which will defeat federal equity jurisdiction must be one available on the law side of the Federal court, and not merely one available in the State courts.

Risty v. *C. R. I. & P. Ry. Co.,* 270 U. S. 378.
Smyth v. *Ames,* 169 U. S. 466, 516.
Chicago, Burlington & Quincy R. R. Co. v. *Osborne,* 265 U. S. 14.
Franklin v. *Nevada-California Power Co.,* 264 Fed. 643, 645.

The jurisdiction of the Federal courts is determined by the Constitution and acts of Congress, and cannot be limited by State legislation. Where the necessary judicial facts exist and the case is of such a character as to require the exercise of the jurisdiction of a court of equity, the complainant may resort to the equity side of the Federal court, notwithstanding the fact that he has an adequate remedy in the State courts under State law.

Smyth v. *Ames,* 169 U. S. 466, 516.
Chicago, Burlington & Quincy R. R. Co. v. *Osborne,* 265 U. S. 14.
Risty v. *C. R. I. & P. Ry. Co.,* 270 U. S. 378.

(f) *State Remedy by Appeal Does not Defeat Federal Equity Jurisdiction where Justiciable Stage Reached.*

The remedy by appeal provided in the State court by Wyoming Revised Statutes, section 115-512 (quoted in Petitioners' brief, pages 11-12 and reproduced in the appendix hereto) does not defeat federal equity jurisdiction, because if the appellate statutory functions are legislative, they cannot, under Article II of the Wyoming Constitution, be exercised by the State courts, and if they are judicial, the litigant, having requisite federal jurisdictional facts, and a recognized ground for equitable interference, has the right to resort to the Federal courts without pursuing his remedy in the State court.

Article II of the Wyoming Constitution, referred to above, is as follows:

> "The powers of the government of this State are divided into three distinct departments: the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

This provision quite clearly limits the courts of Wyoming to the exercise of judicial functions. The legislative or administrative act was therefore complete with the entry of the order of the State Board of Equalization, fixing the value of respondent's property. The matter had reached the justiciable stage and the taxpayer had the right to institute this proceeding in the Federal court.

Bacon v. *Rutland R. R. Co.*, 232 U. S. 134.

Prendergast v. *New York Telephone Co.*, 262 U. S. 43.

Detroit & Mackinac Ry. Co. v. *Michigan Railroad Commission*, 235 U. S. 402.

Chicago and North Western Ry. v. *Bauman,* 69 Fed. (2d) 171 (8th Circuit case decided Feb. 13, 1934, certiorari denied April 9, 1934 ..... U. S. .....)

A remedy by appeal in a State court was held in *Wilson* v. *Illinois Southern Railway Company,* 263 U. S. 574 not to defeat federal equity jurisdiction.

Cases such as *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, where legislative and judicial powers are blended in one body, and where, therefore, the legislative powers must be exhausted before recourse to a federal equity proceeding, are clearly distinguishable.

Mathews v. *Rodgers,* 284 U. S. 521 and *Stratton* v. *St. L. S. W. R. R. Co.,* 284 U. S. 530, are distinguishable because the alleged multiplicity of suits there relied upon would not have involved identity of issues, but would have brought up different questions as to each different business in which a separate plaintiff was involved. The privilege tax complained of in *Mathews* v. *Rodgers* was one applicable separately to a number of different individuals. Each individual had one case possibly differing from each other individual's case. There was not therefore any multiplicity of suits in the true sense. In the instant case, it is the Chicago and North Western Railway Company's taxes only that are involved, and exactly the same questions would arise in each of four suits against four county treasurers. The *Stratton case,* unlike that at bar, did not present a situation involving multiplicity of suits. Neither the *Mathews case* nor the *Stratton case* had in it the element of cloud on title, as the taxes there involved were not of a character constituting a lien on property, but were privilege taxes and franchise taxes, respectively.

(g) *Bill States Sufficient Facts.*

The Bill of Complaint states the ultimate facts, in accord with Equity Rule 25, to the effect that "it shall be sufficient that a bill in equity shall contain * * a short and simple statement of the ultimate facts upon which the plaintiff asks relief * *." If *facts* are pleaded from which it appears that a multiplicity of suits would be necessary to pursue legal remedies, and which show that the taxes constitute a lien on plaintiff's property, it is those facts, and not mere conclusions of the pleader, which give the court jurisdiction.

De Witt v. *Hayes,* 2 Cal. 463, 56 Am. Dec. 352, 354.
Dennis v. *M. & M. Ry. Co.,* 137 Ala. 649, 97 Am. St. Rep. 79.
Town of Flagstaff v. *Gomez,* 242 Pac. 1003 (Ariz.).

In the case at bar the Bill alleges that a valuation was put upon respondent's property in Wyoming by the State Board of Equalization; that the valuation was grossly excessive and constituted a discrimination against the respondent; that the total valuation on respondent's property in Wyoming was, by the State Board, apportioned to each of the several counties; that the valuation so apportioned to each of the four counties was excessive; that the excessive valuation was certified to the four county assessors; that each of the four county assessors levied taxes upon the value certified to him by the State Board, and placed the tax so levied upon the assessment roll and certified the same to the four county treasurers for collection; that the four county treasurers threatened to levy, and unless restrained will levy distraint upon respondent's property and sell the same for the tax so levied on an excessive and discriminatory valuation; and that the illegal taxes levied constitute a lien upon respondent's property and a

cloud upon the title to the same. In addition it is alleged that respondent has no plain, adequate and speedy remedy at law. Except for the allegations of excessiveness of the tax and the discrimination charged, the allegations of fact above recited are admitted by the defendants (R. 12-27).

There can be no doubt that the facts alleged not only warrant but compel the conclusion that respondent was threatened with irreparable injury in the admitted cloud on its title; that it had to sue in equity to avoid the multiplicity of actions at law, and that it had no adequate remedy at law. The court, of course, will view the allegations of fact made in the Bill in the light of the Wyoming Statutes already referred to providing that, while a taxpayer who claims the tax assessed against him to be illegal, may pay the tax and prosecute a legal action for its recovery, he must bring his legal actions against the tax collectors, which in this case means that respondent, if it relies on its legal remedy, must pay to each of the four county treasurers the tax assessed in his county, and must then bring at least four actions at law to recover the illegal taxes paid. Considering the allegations of the Bill in the light of these statutory provisions, it is manifest that respondent's legal remedy by suit involved four separate law actions. The multiplicity of suits is thus apparent from the face of the Bill.

(h) *Present Case Clear Example of Greater Efficiency of Federal Equitable Remedy.*

The present case shows the efficiency of federal equity proceedings. Here were taxes of a complaining taxpayer in four separate counties but all growing out of a single assessment, made (as we shall show under part II of this Argument) as a result of intentional application of a wholly and demonstrably wrong principle and method amounting

to arbitrary action. By joining all the county treasurers in one equity action a multiplicity of suits is avoided and a cloud on respondent's title is prevented. With federal jurisdiction present because of diversity of citizenship and the requisite amount in controversy, and also because of a substantial controversy under the Commerce Clause and under the Fourteenth Amendment to the Federal Constitution, and with the equitable grounds already referred to, the path was clear for the United States District Court in one case to enjoin and correct the wrong of which complaint was made. Federal equity jurisdiction is clearly present.

II.

THE STATE BOARD'S USE OF TRACK MILEAGE AS AN ALLOCATING FACTOR WAS SUCH A WHOLLY WRONG PRINCIPLE AND METHOD, AS TO BRING ABOUT AN ARBITRARY AND INTENTIONAL OVERVALUATION OF RESPONDENT'S WYOMING PROPERTY AND IN EFFECT TO TAX ITS PROPERTY OUTSIDE WYOMING.

There is no controversy here as to the system value of respondent's property for the year in question. The sharp dispute is how much of that system value should be allocated to Wyoming. The propriety of using "traffic units" (ton-miles of freight and passenger-miles in the proportion that those in Wyoming bear to the system) as one factor and "use of rolling stock" (use in Wyoming in proportion to use on the system) as another factor is conceded. A dispute as to whether a third factor should be the proportion of gross revenue earned in the State (as urged by respondent), or a composite percentage of gross revenue and net revenue (as found by the Board) was resolved against respondent which accepted the court's conclusion on that point. The Board persisted in using track mileage as an allocating factor, which is the percentage that track

mileage in Wyoming bears to the track mileage of the system. It may be conceded that where conditions are fairly uniform throughout the system, track mileage is an approved method. But that method is arbitrary and unreasonable where conditions within and without the state differ widely. The effect then is to tax property outside the state under a mere pretense. Such action is an unwarranted interference with interstate commerce and a taking of properly without due process of law.

P. C. C. & St. L. Ry. Co. v. *Backus,* 154 U. S. 421.
Fargo v. *Hart,* 193 U. S. 490.
Union Tank Line Co. v. *Wright,* 249 U. S. 275, 282.
Wallace v. *Hines,* 253 U. S. 66.
Southern Ry. v. *Kentucky,* 274 U. S. 76.

In the case at bar, as the trial court found, the parts of respondent's system within and without the state are not fairly uniform, but differ widely. As the Circuit Court of Appeals said (R. 155):

> "That finding (is) supported by substantial and virtually uncontradicted testimony."

In this aspect of the case it bears a striking resemblance to *Wallace* v. *Hines,* 253 U. S. 66. In that case the court said:

> "As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also

are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

The parts of Wyoming in which respondent's line is located are of the character in relation to its system that North Dakota was to the railroads involved in the *Wallace case.* In fact, the disparity between Wyoming conditions and those of the system in the instant case is even more pronounced than was that between North Dakota conditions and those of the railway systems involved in the *Wallace case,* as respondent's line "peters out," so to speak, at Lander, Wyoming, while those of the railroads involved in the *Wallace case* were transcontinentals which crossed the State in their through routes between the Mississippi Valley and the Pacific Coast.

The Circuit Court of Appeals in the decision sought to be reviewed summarized the vast difference between respondent's road in Wyoming and its system generally in the following succinct paragraph (R. 154-155):

"The court found that the railroad system embraces 8,180.20 miles of main line track of which 278.35 miles are located in Wyoming; but the quality, cost and value of such property within that state, measured by main line track, is greatly less than that throughout the system. That finding is sustained by substantial evidence. Conditions throughout the system are not substantially uniform. They differ widely. The company owns costly grade separations in Chicago, generally known as track elevations raising the main line grade twelve or fifteen feet above the street level to permit traffic in the streets without interruption. There are no such elevations in Wyoming. It has stone ballast in other states. There is none in Wyoming. Its bridges in some of the other states are of the expensive stone or stone arch type, while most of those in Wyoming are temporary in character, called pile trestles. Its station facilities in other states, particu-

> larly in Illinois, are extensive in capacity and expensive in character. Except for three or four, those in Wyoming are of temporary construction, some being car bodies and platforms. With a few exceptions, the rails used for yard and side track purposes in Wyoming are substantially lighter in weight, and consequently less in value, than those used in other states, notably Illinois, Wisconsin and Iowa. These differences are substantial. There is lack of uniformity in conditions throughout the system."

Ample evidence (in fact practically uncontradicted evidence) sustaining that position will be found in the record at pages 85 to 97. Even the dissenting judge in the Circuit Court of Appeals agreed that "the method of valuation adopted was illegal and should be condemned" (R. 161).

That intentional use of such a wholly erroneous factor under the circumstances shown here is more than a mere difference in valuation, and is an attempt to tax property outside the State and justifies a decree enjoining the excessive taxes resulting therefrom is well established by the decisions. Under such circumstances, it is not essential that the members of the Board be shown to have acted from fraudulent or improper motives.

Fargo v. *Hart,* 193 U. S. 490.
Wallace v. *Hines,* 253 U. S. 66.
A. T. & S. F. Ry. Co. v. *Sullivan,* 173 Fed. 456.
Taylor v. *L. & N. R. R. Co.,* 88 Fed. 350, 374 (Certiorari denied, 172 U. S. 647).

III.

THE TRIAL COURT CORRECTLY RESTRAINED THE COLLECTION OF THAT PART OF THE TAX DEMONSTRABLY GROWING OUT OF THE USE OF THE WHOLLY ERRONEOUS FACTOR.

In this case, as we have shown, the allocating factors "traffic units" and "use of rolling stock" were concededly correct. The composite of state proportions of gross and net revenue was upheld by the court as against respondent's contention that gross revenue alone should be used as that factor. Factors similar to these three are those in common use in *ad valorem* taxation of interstate railroads as they accurately reflect the relative use of the railroad plant in any given state. The only other factor used was the wholly erroneous "track mileage." The Board's order showed this (R. 51). The track mileage percentage was 3.29 per cent and was greatly out of line with the other factors used (R. 51). The amount by which the track mileage percentage increased the average ultimate factor was a plain and simple matter of arithmetic. Throwing out the wholly erroneous factor and using the others brought about a percentage which, when applied to system value, produced the proper value of respondent's property in the State. It was then a mere matter of computation to figure the amount by which the values apportioned to each of the four counties should be reduced proportionately. Thus the illegal excess of taxes was clearly apparent and it was that excess, and only that, which was enjoined. This is not a case for a long, drawn out and complicated revaluation. It is simply one where the results of the arbitrary action taken are clearly and mathematically separable, and where the court could end the litigation by a decree enjoining that which was illegal and requiring the prompt payment of that

which was due. Courts should be commended, rather than the reverse, for such effective and common sense disposition of controversies.

Petitioners' repeated references in their brief to the "consideration" by the Board of any other matters than those mentioned by the Board in its order, overlook the fact that *the things which the Board actually used* are shown definitely and affirmatively by its order (R. 51). This is borne out by the testimony of the member of the Board who did the figuring and who was petitioners' main witness (R. 108).

Statements in petitioners' brief to the effect that respondent's officers returned a Wyoming *value* of $8,281,950.00 in a report to the Board are incorrect. That figure was simply a "cost of reproduction new less depreciation" figure and was accompanied by exhibits made up on the same formula which the respondent claimed at the trial and by a specific claim that the fair cash value of its Wyoming property did not exceed $5,849,570.00 (R. 101, 102). The specific reservation commencing at the bottom of page 101 of the record and continuing on page 102 is a sufficient answer to any claim that respondent had ever reported or admitted any such value as $8,281,950.00. The Board recognized the fact that the reproduction figure so reported had nothing to do with fair cash value or value for tax purposes, by paying no attention whatever to it in the order fixing the valuation (R. 51), in which, as already pointed out, the Board showed exactly what it did use.

Conclusion.

Every substantial question of law involved in this case has been decided by this court over and over again. There is no new or doubtful question presented. The facts are substantially uncontradicted and have been decided in re-

spondent's favor by the District Court and that decision has been affirmed by the Circuit Court of Appeals. We believe that the application for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL H. CADY,
WILLIAM T. FARICY,
Of Chicago, Illinois,
ROBERT R. ROSE,
Of Casper, Wyoming,
Counsel for Respondent.

APPENDIX.

Wyoming Revised Statutes, 1931:

SECTION 89-4201. Jurisdiction of district Courts. District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.

SECTION 89-4202. Parties to actions to enjoin levy. Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and bene[illegible] the levy is made; and if the levy would go upon the tax list, the county treasurer must be joined in the action.

SECTION 89-4203. Parties to actions to enjoin collection. Actions to enjoin the col[illegible]ction of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments.

SECTION 115-311. Refunding taxes erroneously paid. In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation, shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall

not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth.

SECTION 115-512. Appeals from board.—Proceedings. Any person, persons, firm or corporation, who may feel aggrieved by the assessment or assessments by the board may take an appeal from the decision of the board to the district court of the county wherein the property or some part thereof is situated, where a trial *de novo* to the court shall be had.

The party or parties appealing shall, within sixty days after the decision of the board, file in the district court to which the appeal is taken a petition setting out the cause of complaint, and a copy of the records of the board, all duly certified by the secretary of said board, and copies of said assessment or assessments.

The party appealing shall at the time of filing such appeal enter into an undertaking to be approved by the clerk or judge of said district court, and to be given to the state of Wyoming in such an amount as the court or judge may fix, but in no case less than five hundred dollars ($500.00), and conditioned that the appellant shall prosecute the appeal without unnecessary delay, and for the payment of all costs, taxes, interest and penalties that may be ultimately levied on the property, the assessment of which is in controversy.

The clerk of the court shall immediately upon filing of the appeal notify the secretary of the board under the seal of the court, and supply him with a copy of the petition.

It shall be the duty of the attorney general and the county attorney of the county to which the appeal is taken to represent the board in proceedings on the appeal.

All proceedings on appeal except as herein otherwise provided shall be under the provisions of the code of civil procedure, as in other civil cases.